letters to the editor

The Energizer Bunny Has Nothing On the Attorneys' Fee Debate

To the Editor:

Alan Tarr's letter (*Tax Notes,* Aug. 14, 2000, p. 950) raises a number of interesting thoughts. First, I don't agree that the assignment of income doctrine is quite as appropriate in this context as Alan suggests. True, there are differences in the laws of the several states as to the interest that an attorney acquires by virtue of the attorney's lien. Mr. Tarr is also right that *Cotnam* assumes the claim has little or no value at the time the lawyer takes the case (and any arguable "assignment" occurs).

As to the assignment of income doctrine in general, although there is certainly a question of the value of the case at the time of the assignment, I just don't see that as being the most pertinent argument, even for the IRS. Although I hardly want to suggest new theories for the Service to use, it has always seemed to me that if (and I emphasize *if*) the IRS is correct about the result in these cases, the discharge of indebtedness doctrine is a far more effective argument than the antiquated and largely (in my view anyway) inapplicable assignment of income doctrine.

Besides, I think Mr. Tarr says a great deal when he says "unless a partnership is created . . . ." The notion that a plaintiff and his or her lawyer are effectively engaged in a partnership strikes me as an awfully persuasive position for plaintiffs and their lawyers to take. A contingent fee case truly is like a partnership, and probably satisfies the definition of a partnership under the Uniform Partnership Act (two or more persons jointly engaged in an effort to produce a profit).

As to Alan's comment that this is a problem that has to be resolved by Congress, I don't agree. True, Congress *could* resolve it, and I think the likelihood is that Congress will resolve it. But there are at least two other possibilities. One is that it will be resolved by the appellate courts (the U.S. Supreme Court resolving the split among the circuits). The other possibility (although this may seem awfully optimistic to many *Tax Notes* readers) is that the five Tax Court judges who dissented in *Kenseth* may convince the rest of the Tax Court to start deciding all of these cases on a consistent basis — consistently in favor of the taxpayer.

Let me turn to Mr. Tarr's question "How do you deal with the problems under current law?" He is right that the employer faces a dilemma.

If you are representing an employer, you could insist that the employer include the legal fee on the 1099. On the other hand, because the section 6045(f) regulations are not yet in effect (they will be next year), the employer could, as Mr. Tarr suggests, examine the retainer agreement between employee and counsel, rely on an opinion from the plaintiff's counsel, or use some other reasonable basis to conclude that the old rules of 1099s should apply (basically, cut the checks and have the 1099s follow the checks). Representing employers vs. plaintiffs can obviously be partisan, but I don't see that the risks to the employer if it follows some of these steps are too great. Of course, the employer clearly has serious risks if there is an argument that the amount of money (that would be paid directly to the lawyer) is possibly subject to withholding.

I don't know the risk of audit in transactions of this type. I do suspect that employer practices (and many employers' willingness to be somewhat flexible on these points) may end with the renewed effectiveness of the proposed regulations on attorney reporting under section 6045(f), currently scheduled to kick in once again for payments made after December 31, 2000.

Very truly yours,

Robert W. Wood
San Francisco
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